

Attorney-client calls from jail recorded

Did prosecutors listen? It's unclear

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Defense attorneys say the Sheriff's Department improperly recorded their privileged conversations with jailed clients. The Sheriff's Department says it was a mistake and does not know how many such calls were recorded. It is unclear whether prosecutors listened to the recorded conversations.

The San Diego County Sheriff's Department unplugged a system this week that records all phone calls from jail inmates after outraged defense lawyers realized their conversations with clients also were being recorded.

A lawyer for the Sheriff's Department said the recordings, which defense lawyers say are privileged conversations protected by law, were made because of an inadvertent glitch in the telephone system.

But defense lawyers said the eavesdropping is a felony under state law and can carry penalties of up to \$5,000 per call.

They are also concerned that prosecutors – who have access to the recording system from their desktop computers – could have been privy to conversations, too.

In at least one case, a defense attorney filed a motion this week seeking to get the District Attorney's Office removed from his case.

Jim McMahon, a lawyer with the county Alternate Public Defender, said he found out that his calls with client Robert Crouse were recorded when he heard them on a disc provided by prosecutors. It was in a package of materials that all prosecutors are required to turn over before trial.

Prosecutors planned to use some of the phone conversations Crouse had with friends and associates during the case, McMahon said.

“So imagine my surprise,” he said. “I'm listening to the phone calls and up comes one with my voice, talking one-on-one with my client about trial strategy.”

McMahon said he did not know if prosecutors listened to any of the recordings, adding that the mere fact that they had them was bad enough. “I'm not at all comfortable with the DA being supplied with confidential, privileged phone calls with my client,” he said.

Sanford Toyen, a lawyer and a special assistant to the sheriff, said it was unknown how many attorney-client phone calls have been recorded.

However, all of the calls from the jail that were recorded have an automated message at the beginning warning that the conversation was being monitored or recorded.

"I don't know if it's privileged if both parties are warned they are being recorded," Toyen said. "If a client in jail made a phone call to me and I heard that, I wouldn't say anything that I wouldn't want recorded."

Jack Campbell, a public defender in Vista, said he has heard the warning for some time, but has still raised an objection because he said the law is clear that recording such conversations is wrong. He has filed court papers in a case he is handling to stop the practice.

The Sheriff's Department launched the recording system in 2003 with AT&T and switched to PCS in February 2007.

Using an attorney directory, the department uploaded a database of 5,000 phone numbers of local attorneys. If an inmate called one of those numbers, the call would not be recorded.

However, sheriff's officials said they did not realize how deficient their database really was.

"We thought we had a better database," Toyen said.

Inmates have no right of privacy in jail, and courts have long held that their phone calls can be taped. But California law prohibits recording conversations from jail between attorneys and clients, Public Defender Steve Carroll said.

In an e-mail message sent June 11 to all lawyers in his office, Carroll said the law is "unequivocal in its prohibition of this conduct." In the same e-mail, Carroll said his office is considering filing lawsuits against the Sheriff's Department and District Attorney's Office.

He also wrote that referring the matter to the state attorney general also might be warranted.

"We don't know the extent right now of how many attorney-client calls were recorded," Carroll said. He said his office is talking with the District Attorney's Office to determine whether prosecutors improperly listened to any calls.

"We know they had the access and the ability to do that," he said. "What we don't know is if they listened."

District Attorney Bonnie Dumanis said yesterday that prosecutors only recently became aware of the situation and have a committee working on it. She said she takes any breach of the attorney-client privilege seriously.

But she said she was not aware of any instance in which a prosecutor or a district attorney's investigator listened to any protected conversations between lawyers and clients.

The state law prohibiting eavesdropping on attorney-client calls also bans listening to confidential conversations between doctors and patients, and ministers and penitents.

In January 2007, a newsletter analyzing recent court cases written by prosecutor Robert Phillips and posted on the sheriff's Web site discussed that law. In many instances, eavesdropping on an inmate call is lawful, Phillips wrote.

But listening to attorney-client talks is a felony and "a serious no-no," he added.

Toyen said part of the problem occurred when inmates would call attorneys' direct lines or cell phones – numbers that are not usually published in lawyer rosters and directories. Often only the main number for the attorney's law firm or public defender's office is listed.

He said the system is being changed to allow lawyers to have their calls blocked out.

"If a client calls an attorney, and they hear the message that 'this call is being recorded,' they will also get a number to call to say, 'I'm an attorney and need to be put in the database' " Toyen said.

Campbell, the Vista public defender, said such a solution is not satisfactory.

"They put the burden on the defense attorney to opt out," he said.

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